ABN 82 080 744 163

The Hon Justice Geoffrey Giudice
President
Australian Industrial Relations Commission
Level 4, 11 Exhibition Street
MELBOURNE VIC 3001

Via email: amod@air.gov.au

Dear Justice Giudice

Re: AM42008/2 - AM2008/12 - Award Modernisation

We would like to make the following submission to the Australian Industrial Relations Commission (**AIRC**) in relation to the draft modern awards on behalf of the Investment and Financial Services Association (**IFSA**), the Financial Planning Association of Australia (**FPA**) and their respective members.

A. WHO WE ARE

IFSA is a national not for profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 140 members who are responsible for investing over $1 trillion on behalf of more than 10 million Australians. IFSA members' compliance with IFSA Standards and Guidance Notes ensures the promotion of industry best practice.

The FPA is the peak professional body for the financial planning sector in Australia. The FPA has approximately 12,000 members. The FPA represents qualified financial planners who manage the financial affairs of over 5 million Australians with a collective investment value of $630 billion.

B. OUR INTERESTS

The *Workplace Relations Act* 1996 (Cth) (**Act**) provides that the Full Bench of the AIRC may, in carrying out the award modernisation process, inform itself in any way it thinks appropriate, including by consulting with any other person, body or organisation in any manner it considers appropriate.

In the award modernisation request made on 28 March 2008 by the Minister for Employment and Workplace Relations to the AIRC (**Request**), the Minister requires the AIRC to:

> *"publish exposure drafts of each modernised award for the purpose of further consultation and to ensure that **all stakeholders and interested parties** have a reasonable opportunity to comment upon the exposure drafts"*.

In its Statement of 29 April 2008, the AIRC confirms that *"[p]arties to relevant federal awards, unions and employers bound by State awards operating as NAPSAs **and other interested parties** will be able to express views, present material, suggest amendments in the scope of awards or in their substantive provisions and to propose alternate drafts".*

IFSA, the FPA and their respective members believe that they have an interest in the modern awards, including to the extent that they provide superannuation and related services to employers and employees in the industries in which the modern awards will apply. As to this, IFSA, the FPA and their respective members rely upon what is said in this letter. This interest exists despite the fact that IFSA, the FPA and their respective members will not, themselves, be bound by any of the modern awards currently being considered by the AIRC.

The AIRC has previously recognised that superannuation funds have a significant interest in award provisions dealing with superannuation given that these provisions direct where substantial amounts of superannuation contributions will be made. (See Re Clerical and Administrative Employees (Victoria) Award 1999 and other awards, AIRC, 17 August 2004 PR950653).

Available research indicates that the default superannuation funds provisions will direct not just a substantial amount, but the vast majority of superannuation contributions for employees covered by awards to the nominated superannuation funds.

Ernst & Young research estimates that only 10 per cent of Australians have exercised their right to choose their superannuation fund. Estimates by InvestmentLink (which provides clearing house services to employers contributing to nearly 1.2 million active superannuation accounts) based on one of the largest samples available and representing 12 percent of working Australians, indicates that 7 per cent of members had exercised choice in the first 18 months after the superannuation choice legislation came into force. InvestmentLink consider that a more accurate reflection of the levels of choice when small to medium employers are taken into account is 10 to 15 percent of the eligible population. (See InvestmentLink press release dated 1 February 2007, http://www.investmentlink.com.au/news/?newsid=20070201)

Based on the best available data 85 to 90 percent of employees do not exercise their right to choose the superannuation fund into which their contributions will be made. (See Senator Sherry's submission to the AIRC on award modernisation and default superannuation funds)

As a result, IFSA, the FPA and their respective members, being other interested parties, have standing to make written submissions and attend final consultations on the exposure drafts before the Full Bench of the AIRC.

C. INTRODUCTION

The matters raised in this letter relate to the proposed superannuation provisions contained in the draft modern awards and, in particular, the provisions which

nominate the default superannuation fund into which an employer must make superannuation contributions on behalf of an employee when the employee does not exercise their right to choose a superannuation fund.

D. SUMMARY OF POSITION

For the reasons set out in this letter, IFSA, the FPA and their respective members believe, for the reasons set out below, that modern awards should not specify the default superannuation fund into which an employer must make superannuation contributions on behalf of an employee when the employee does not exercise their right to choose a superannuation fund.

If the AIRC is not supportive of not specifying default superannuation funds in modern awards, IFSA, the FPA and their respective members outline alternative approaches in relation to the default superannuation funds later in this letter.

E. INTRODUCTION - PROPOSED SUPERANNUATION PROVISIONS

The current exposure drafts of the modern awards contain superannuation provisions which, in summary:

(a) refer to the relevant superannuation legislation and note that the legislation governs the rights and obligations of the parties in relation to superannuation;

(b) indicate that the purpose of the superannuation provision is to supplement the rights and obligations contained in the legislation;

(c) require the employer to make such contributions to a superannuation fund on behalf of an employee as are necessary to avoid the employer being required to pay the superannuation guarantee charge under the superannuation legislation for that employee;

(d) set out the mechanism by which employees can elect to make voluntary additional superannuation contributions; and

(e) with the exception of the Rail Industry Award, the Coal Mining Industry Award and the Mining Industry Award, provide that unless an employee has chosen the fund into which they wish to have their superannuation contributions made in accordance with the choice of fund legislation, the employer must make the superannuation contributions to the fund or funds specified in the award.

F. SUBMISSIONS

Fair Minimum Safety Net

Section 576J(i) of the Act provides that a modern award may include terms about superannuation.

However, section 576L limits the broad nature of the wording in section 576J by providing that a modern award may include the matters referred to in section 576J only to the extent that the terms provide a fair minimum safety net.

IFSA, the FPA and their respective members believe that the provision in 11 of the modern awards which specifies the default superannuation fund into which superannuation contributions must be made for those employees who do not exercise choice is a matter which is not necessary to establish a fair minimum safety net.

The historical nomination of default superannuation funds in awards is largely a reflection of the historical development of the superannuation industry. Many of the superannuation products available when compulsory employer superannuation contributions were introduced were designed as vehicles for voluntary savings, rather than vehicles for near universal compulsory employer contributions.

There have been significant developments in the superannuation industry since that time. The industry is now characterised by a large number of complying providers who have products designed for the near universal compulsory employer superannuation contribution market, each of which competes for employer superannuation contributions.

The *Superannuation Guarantee (Administration) Act 1992* requires that a default superannuation fund is a complying superannuation fund which provides a minimum level of insurance benefits. In our opinion this is not an area where the legislation needs to be or should be supplemented.

While we believe that the relevant legislation itself provides a fair minimum safety net, we acknowledge the Government's intention to allow the parties to supplement these provisions. We also acknowledge that if positive obligations are imposed upon employers to make superannuation contributions and to make those contributions at specified frequencies, then such obligations may be considered to be a necessary part of a fair minimum safety net for employees. However, it is suggested that the nomination of one or a small number of superannuation funds from the hundreds of available complying superannuation funds is something which it is unnecessary for the AIRC to do, and should not do, having regard to section 576L of the Act.

In our opinion, not only is it not necessary to specify a default superannuation fund in order to provide a fair minimum safety net, but it has the potential to provide something less than a fair minimum safety net. This is because, among other things:

(a) the performance of superannuation funds changes from time to time; and

(b) the other benefits provided by superannuation funds continue to evolve and expand. Choice has introduced competitive pressures into the superannuation market which have driven, among other things, innovative customer service offerings, reduced pricing, and a larger and more diverse produce range for employees.

Further, the AIRC should, in our opinion, be particularly mindful given the current financial crisis that the future performance and viability of any financial institution is not guaranteed. Requiring employers and employees to make contributions to one superannuation fund or a limited number of superannuation funds provides significant potential for both employers and employees to be worse off than if they were able to choose their own default superannuation fund, whether now or in the future.

We note the submissions previously made to the AIRC suggested that under-performance by superannuation funds has a significant impact on retirement benefits and that, in circumstances where most superannuation contributions will be made to the default superannuation fund, it is not desirable to have an underperforming fund as the default superannuation fund.

However, there are cost effective and well performing superannuation funds across all segments of the superannuation industry, namely, corporate, industry and retail superannuation funds.

We also note that much of the comparison of fund performance data does not take into account other benefits offered by superannuation funds such as enhanced insurance benefits, member services, education and access to financial advice.

IFSA, the FPA and their respective members believe that the assessment of which is the best superannuation fund for an employee or group of employees who have not elected to make any choice themselves will depend on an assessment of the demographic profile and retirement needs of the employees together with the range of superannuation funds available within the superannuation industry. It is suggested that this is not an inquiry or determination that the AIRC should embark upon or determine by the making of an award which specifies a particular fund to the exclusion of other complying superannuation funds that may be assessed at the workplace level as a more suitable default superannuation fund.

The specification of a default superannuation fund, or a limited number of default superannuation funds, in a modern award will restrict the ability of an individual workplace to consult, agree upon and put into effect an appropriate default superannuation fund.

IFSA, the FPA and their respective members believe the only means by which the AIRC can ensure that employers and employees have the flexibility to ensure that their default superannuation fund is one of the better performing funds and the most appropriate for them from time to time is to enable them to have the flexibility to choose that fund. This will provide a genuine safety net.

In this regard, we note the AIRC's statement that it does not consider that it is appropriate for the AIRC to conduct an independent appraisal of the investment performance of particular funds.

Public Interest Considerations

Section 103(1) of the Act requires that in the performance of its functions, the AIRC must take into account the public interest, and for that purpose must have regard to:

(a) the objects of the Act; and

(b) the state of the national economy and the likely effects on the national economy of any order that the AIRC is considering or is proposing to make, with special reference to likely effects on the level of employment and on inflation."

In our submission there are two issues of public interest to which the AIRC should have regard before making a decision with respect to the default superannuation fund provisions in the modern awards. They are:

1. The impact of the lessening of competition in the financial services industry; and

2. The impact of the default superannuation fund provisions on the financial services industry.

Competition

Given that available research indicates that 85 to 90 percent of employees have their superannuation contributions paid to the default superannuation fund, the nomination of default superannuation funds in the modern awards will have the effect of delivering a significant portion of the superannuation market to only a small number of funds, that is those which are nominated to the exclusion of the majority of complying superannuation funds participating in the superannuation industry.

The superannuation industry is currently comprised of a large number of providers who compete for employer superannuation contributions. The highly competitive nature of the industry has driven innovative customer service offerings, reduced pricing and created a larger and more diverse product range for employers and employees. We believe that the effect of the proposed default superannuation provisions in modern awards would be, in effect, to create a monopoly or duopoly for the nominated superannuation fund or funds with the potential consequences of, among other things:

(a) less investment;

(b) lower returns; and

(c) higher prices,

than would be the case, if, other things being equal, the position in relation to superannuation was competitive.

IFSA, the FPA and their respective members believe that the lessening of competition in the superannuation industry may have a detrimental impact on the superannuation benefits and services available to both employers and employees and ultimately a detrimental impact on the retirement outcomes of Australians.

Further, the proposed provisions for modern awards may lead to superannuation funds being forced out of the market and consequently a further lessening of competition.

Impact on the Industry

As noted above, the nomination of default superannuation funds in the modern awards will have the effect of delivering a substantial majority of employer superannuation contributions in respect of award covered employees to the small number of funds nominated.

Further, the remainder of the superannuation funds will, in effect, be excluded from this market. These are funds which comply with legislative requirements and in many cases perform as well or better than the funds nominated.

Such a decision has the potential to lead to a number of funds ceasing to be viable, the possibility of such funds being subsumed within other funds and the possible loss of jobs, which is not in the public interest. It also increases the market power of the nominated funds which may be detrimental to those funds not included in the awards.

G. ALTERNATIVES

1. No default superannuation fund nominated

For all of the reasons referred to above, our preferred approach would be to have no superannuation fund nominated as the default superannuation fund in the modern awards. This would ensure maximum flexibility to allow employees and employers to determine the most appropriate superannuation fund from time to time.

2. Nominate a default superannuation fund but allow employers to nominate an alternative superannuation fund

If the AIRC does not support the preferred approach of IFSA, the FPA and their respective members, a second option would be to provide in the modern awards that superannuation contributions must be made to the nominated default superannuation fund or any other complying superannuation fund chosen by the employer. This approach would provide a competitive advantage to the superannuation fund or funds nominated in the award, but would not prevent other funds from competing. IFSA, the FPA and their respective members suggest the following award provision in this regard:

> *"Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause x.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause x.2 and pay the amount authorised under clauses x.3(a) or x.3(b) to one of the following superannuation funds:*
>
> - *XX;*
> - *XX, or*
> - *such superannuation fund as the employer may nominate from time to time."*

3. Nominate a default superannuation fund but allow employers and employees to agree a different fund

If the AIRC does not support the approaches outlined above, a further option would be to provide that the superannuation contributions must be made to the nominated default superannuation fund or funds, or such other complying superannuation fund as agreed between the employer and employees. IFSA, the FPA and their respective members suggest the following award provision in this regard:

> *"Unless to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause x.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clauses x.3(a) or x.3(b) to one of the following superannuation funds:*
>
> - *XXX;*
> - *XXX, or*
> - *the fund agreed in writing between the employer and the majority of the employees covered by this Award at a place of work.*

H. PRESERVING EXISTING ARRANGEMENTS

If the AIRC does not accept the preferred approach of IFSA, the FPA and their respective members, any decision which the AIRC makes with respect to the default superannuation fund provisions in the modern awards, in our opinion, should appropriately preserve existing default superannuation arrangements.

Consistent with the approach taken with respect to the Victorian common rule awards, in our opinion the AIRC should include a provision in modern awards which states that where an employer is making contributions into a particular default superannuation fund, the employer is not required to change that arrangement as a result of the commencement of the modern award.

If the AIRC does not support this position, we suggest that it should seek submissions about appropriate transitional arrangements with respect to default superannuation funds.

I. FURTHER MATTERS

If the AIRC does not support the approaches advanced by IFSA, the FPA and their respective members, with respect to default superannuation fund provisions in modern awards, then we believe that modern awards should only specify a superannuation fund or funds as the default fund or funds after a transparent assessment of the performance of those funds and the benefits delivered to members of those funds. If the AIRC is minded to proceed on this basis, we would seek the opportunity to make submissions about the appropriate criteria to be used in the assessment.

IFSA and the FPA will appear at the hearing in Sydney on Monday, 20 October 2008 to make oral submissions supplementing what has been said in this letter.

Yours sincerely

Mr John O'Shaughnessy
Deputy Chief Executive Officer
Investment & Financial Services Association Limited

Mr Gerard Fitzpatrick
General Manager – Policy and Government Relations
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